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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 595

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims (R. 29-33) are reported in 108 F. Supp. 731.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). A timely motion for rehearing was overruled on February 3, 1953 (R. 36). The petition for a writ of certiorari

was filed on April 1, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Morris Lober, now deceased, created three trusts, one for each of his minor children, each trust instrument providing that the donor, as trustee, should collect the income and in his discretion accumulate it in whole or in part, such accumulations to be paid over to each beneficiary when he should reach his majority, the principal to be paid to such beneficiary upon his reaching the age of 25 years. The donor reserved the power in his discretion to make payments to the beneficiary from the principal of the trust at any time. The question presented is whether the value of the corpus of these three trusts was properly includible in the decedent's gross estate under the provisions of Section 811(d)(2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the statute and Regulations involved are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

The special findings of fact of the Court of Claims (R. 33-35) may be summarized as follows:

Petitioners are the executors of the estate of Morris Lober, a resident of New York, who died on December 13, 1942 (R. 33).

On October 31, 1924, Morris Lober, created a trust for the benefit of his son, Robert T. Lober

(R. 33). The trust instrument provided for the transfer by the donor to himself, as trustee, of certain property in trust to hold, invest and reinvest the same and to collect and receive the income thereof during the life of Robert T. Lober, or until he should reach the age of 25 years, the net income so collected to be never at any time either in whole or in part expended for the maintenance, education, and support of Robert T. Lober during his minority, but accumulated for his benefit in whole or in part, as the trustee might deem proper, such accumulations of income, if any, to be paid over to Robert T. Lober upon his reaching his majority, the principal of the trust estate or the remaining portion thereof to be paid over to him upon his reaching the age of 25 years. (R. 5-6, 33-34)

The trustee in his discretion might make payments to Robert T. Lober from the principal of the trust estate, the amount and time of such payments to rest in the discretion of the trustee, and any and all of the sums so paid were to be entirely free from the trust and to be the absolute property of the payee (R. 6, 33-34).

The instrument further provided, after giving the trustee general control over investments, that in case of the donor's death before the son reached the age of 25 years, the wife of the donor should be appointed trustee with the same powers and rights as those conferred upon the donor, as trustee (R. 7).

On March 15, 1929, decedent created a separate trust for the benefit of his son, James Morris Lober, and on March 18, 1929, a separate trust for the benefit of his daughter, Maxine Lober. The provisions of these two trust instruments were almost identical with those of the trust for the benefit of Robert T. Lober. (R. 33-34.)

In the estate tax return of the decedent, the value of these three trusts was not included as part of his gross estate. The Commissioner of Internal Revenue determined a deficiency in estate tax, resulting in part from the inclusion in the estate of the decedent of all the assets of the three trusts above mentioned. The deficiency, together with interest, was duly paid, a timely claim for refund filed, and this suit brought in the Court of Claims within two years from the rejection of such claim. (R. 34-35.) The Court of Claims, upon the foregoing findings of fact, held that petitioners were not entitled to recover, and dismissed the petition (R. 35).

ARGUMENT

1. The decision of the court below that the Commissioner of Internal Revenue properly included the value of these three trusts in the decedent's gross estate under the provisions of Section 811 (d) (2), *infra*,[1] is correct and in accord with the deci-

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[1] Section 811(d)(1) refers to transfers made after June 22, 1936, where the decedent reserves the power to alter, amend, revoke or terminate and (d)(2), the section here applicable, refers to transfers made on or prior to June 22, 1936, where the power was to alter, amend or revoke. In view, however, of this Court's holding in the *Holmes* case, 326 U.S. 480, that the addi-

sion of this Court in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480.

The powers reserved by the grantor in this case with respect to accumulating the income and the power to terminate any of the trust agreements by paying over the principal to the respective beneficiaries, are almost identical with those reserved in the *Holmes* case, *supra*. The only difference is that in the *Holmes* case, in the event of the death of a beneficiary before the expiration of the 15-year period when the trust would otherwise terminate, the principal was to go to each beneficiary's issue or failing such issue to the other sons or their issue, the trust being for the benefit of the three sons.[4] In the instant case, the principal of each trust was to be paid over to the named beneficiary upon his reaching the age of 25 years, but no provision was made in the trust instrument as to who should take in the event of the death of such beneficiary prior to the termination of the trust.[4] This Court, in the *Holmes* case, held that the power to pay over the principal and thus, in effect, terminate the trust, coupled with the power to accumulate income, was a power within the meaning of Section 811(d).

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tion of the word "terminate" was merely declaratory of existing law, the same considerations govern in both instances and it is immaterial whether subsection (1) or (2) is involved. No distinction is therefore made in the discussion of cases involving these two subsections.

[4] The fact that there was a spendthrift provision in the *Holmes* trust and not in this, as petitioners point out, is immaterial in view of the provisions of Section 15 of the Personal Property Law of New York, discussed *infra*, pp. 7-8, 10-11.

the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, or to decide that he shall not have them at all for any of these purposes, but that his creditors, his children, wife, or collateral relatives should have them, has a significant control over the assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner* v. *Holmes*.

It is clear that here, just as in the *Holmes* case, more than mere acceleration of payment is involved. The exercise of the power reserved by the grantor would enable a particular beneficiary to have present enjoyment of both the accumulated income and principal of the property, since, if he should die before the termination of the trust, his heirs, devisees, or creditors would enjoy it and he himself would have no actual enjoyment of it, as that term is used in the *Holmes* case.

Moreover, even though a beneficiary here had a vested interest in the sense that if he had died before the grantor, the trust *res* would have descended to his heirs at law or assigns, he had no right under the law of New York to require payment of income or principal except under the terms of the trust (*Brandt* v. *Continental Bank & Trust Co.*, 43 N.Y.S. 2d 255) and no right to alienate his interest therein. (40 McKinney's Consolidated Laws of New York, Personal Property Law, Sec. 15, p. 127).[5]

[5] That section provides, "The right of the beneficiary to enforce the performance of a trust to receive the income of

Petitioners assert that the decision of the court below is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hoge' Estate* v. *Commissioner*, 183 F. 2d 169. In the *Hoge* case, which was based primarily on a construction of the statutory law of the State of Mississippi, the court of appeals held that under Mississippi law if any beneficiary had died during the existence of the trust his heirs would have taken by operation of law. On this premise, the court concluded that the beneficiaries had vested interests, the right of enjoyment of which could not be changed by the exercise of the reserved power; that the case was not governed by the *Holmes* decision; and that the power reserved by the grantor, as trustee, to terminate the trust by paying over the principal to one of the named beneficiaries was not, therefore, a power within the meaning of Section 811 (d)(1). We believe that the decision of the Fifth Circuit in the *Hoge* case is erroneous,* just as was its prior decision on the reserved-power issue in *Commissioner*

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personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise." This has been held applicable where the trust is to apply the income to the use of the beneficiary himself. *Matter of Unprich*, 301 N. Y. 415, 419. See also *In Re Sanford's Estate*, 262 N.Y.S. 491-495.

* For instance, as intervening in conclusion in part, the court stressed the fact that the powers to distribute or accumulate income and to terminate the trust were granted to the decedent (the settlor) as trustee. However, Section 811(d)(1) refers to a power "in whatever capacity exercisable" and this has been held as declarative of existing law and applicable to

v. *Estate of Holmes*, 148 F. 2d 740, reversed by this Court, 326 U. S. 480.

None of the cases cited by petitioners (Br. 14-15) supports the proposition that this Court's decision in the *Holmes* case (Br. 14) "has been interpreted as meaning that Section 811(d) is applicable only to powers over conditional interests." In every one of those cases the power was held sufficient to come within the provisions of Section 811(d) and any language upon which petitioners depend to support their position, even if such a construction is permissible, was mere *dicta*. On the other hand, the decision of the court below is supported by the decisions in *Melton* v. *Driscoll*, 117 F. 2d 477 (C.A. 3), certiorari denied, 313 U. S. 579; *Commissioner* v. *Roger's Estate*, 173 F. 2d 613 (C.A. 3), petition for certiorari dismissed per stipulation, 337 U. S. 937; *Commissioner* v. *Newbold's Estate*, 155 F. 2d 694 (C.A. 2); *Hobbizelle* v. *United States*, 3 F. Supp. 331 (C. Cls.); and *Inman* v. *Commissioner*, 18 T. C. 522, reversed on other grounds by the Court of Appeals for the Second Circuit, decided April 6, 1959 (1959 P-H, par. 172,563).[7] In the last case,

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powers under Section 811(d)(2); *Welch* v. *Terhune*, 126 F. 2d 833 (C.A. 1); *Baker Trust Co. of Pittsburgh* v. *Driscoll*, 138 F. 2d 152 (C.A. 3); cf. *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, 486-487.

[7] The only question raised by the appeal related to the valuation of the life estates during the time the beneficiaries were absolutely entitled to the income. The Court of Appeals, in effect, sustained the Tax Court's conclusion as to its construction of Section 811(d), with respect to the inclusion in the gross estate of the value of the remainder interests. In that

the Tax Court held that Section 811(d) applied (p. 536) "even though termination would result only in the acceleration of the nephews' interests as remaindermen because the nephews' enjoyment of the principal is thereby made certain." In the *Hagert* case, *supra*, a power reserved by the grantor, as trustee, was held to be a power to alter or amend within Section 811(d) where he could accumulate income and allocate gains from the sale of trust stock to either income or corpus, but had no power to defeat the interests of the remaindermen in the original trust corpus. In the *Mellon* case, *supra*, the court held that Section 811(d) required the inclusion in the gross estate of property which was to be held for the benefit of grantor's two minor children, giving them the income for life with power to appoint by will, but the grantor reserved the power to revoke, whereupon the principal was to be distributed to the three children, the life beneficiaries. Cf. also the *Hobbitzelle* case, *supra*, where the Court of Claims stated that a power reserved by a grantor to direct unequal distribution of trust income between her two daughters (life beneficiaries) was (p. 334) an "important and substantial" power.

In the court below, the Government took the position that under the laws of the State of New York

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case the principal was to be divided into three parts, and the income from each part to be paid to one of three nephews for a term of years or until his death and the trust could be terminated by the joint action of all three trustees (the nephews), except that during the lifetime of the grantor his consent had to be obtained. This was the *only* power reserved by the grantor.

these beneficiaries did not have vested interests in the sense in which that term is used in the *Hoge* opinion. The court below, however, found it unnecessary to decide the point. If our contention on this point is sound, even the apparent conflict between the decision of the court below and the *Hoge* case disappears. In the case at bar, the trust instruments expressly give the beneficiaries only life estates until they have reached the age of 25 years. Under the general law of trusts, in the event of the death of a beneficiary prior to the termination of the trust with no provision being made in the instrument for the devolution of the property, it reverts to the grantor or is held in trust for his benefit. *Chater* v. *Carter*, 283 U. S. 572; *Doctor* v. *Hughes*, 225 N. Y. 305; *Newton* v. *Hunt*, 201 N. Y. 509; Restatement, Trusts (1935), Sec. 411; cf. concurring opinion of Mr. Justice Reed in the case of *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 685.* In such circumstances, the corpus of the trusts would be clearly includible in the decedent's gross estate under the *Holmes* decision, since if the property might have reverted to the grantor the exercise of the power involved would have conferred a "substantial present economic benefit" on the beneficiary which he might not otherwise have enjoyed.

2. The other contentions of petitioners are without substance. Whether, if one of the beneficiaries

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*This concurring opinion and his dissenting opinion in *Commissioner* v. *Estate of Church*, 335 U. S. 632, are reported together, beginning on page 651.

had died before the decedent, an estate tax would have been due on his estate depends, of course, upon the law of New York. Even if, under that law, such a tax would be due, it does not preclude the tax on the grantor's estate if he dies first. A similar situation may arise where a transfer is made in contemplation of death and the donee dies before the grantor and also possibly in cases where property is taxable under a power of appointment under Section 811(f) of the Internal Revenue Code. Neither is the fact that the making of these gifts subjected the donor to gift tax liability of any consequence. There is no showing in this case that any gift tax was actually paid on the trust created for Robert T. Lober in 1924. The other two trusts were created in 1923 when there was no gift tax liability. This Court held in the case of *Smith* v. *Shaughnessy*, 318 U. S. 176, 179, that the gift and estate taxes are not always mutually exclusive and that a gift tax is in effect in some instances a security, "a form of down-payment on the estate tax which secures the eventual payment of the latter; * * *." It recognized there that under certain circumstances the same transaction may be subject to both a gift and estate tax. Petitioners' contention that trusts involving the question of Section 811(d) powers are an exception to this general principle (Br. 19-20) is not convincing.

The further contention that Section 811(d) does not apply in this case, since the transfers here were not testamentary in character, is also without merit. Congress has provided that if a donor reserves any

of the powers designated in Section 811(d) in a transfer of property, the transfer is "deemed" to be a substitute for a testamentary disposition. Cf. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 92. Under the statute, the property is includible in the decedent's gross estate if the reserved power comes within the provisions of Section 811(d). That is all that is required.

CONCLUSION

The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1953.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated except real property situated outside of the United States—

* * * * * *

(d) *Revocable Transfers*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the en-

joyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

* * * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1928, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addi-

tion is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

(b) *Taxability.*—The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

* * * * *

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1926 became effective (June 23, 1926), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * *